NO. 89-1326

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NANCY CROWDER, Individually and as Independent Executrix of the Estate of James Ralston Crowder,
Petitioner

v.

KEN SINYARD, et al,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William G. Bullock
HUBBARD, PATTON, PEEK,
HALTOM & ROBERTS
P. O. Box 1928
Texarkana, Texas 75504
(214) 794-3341

Attorneys for all
Respondents except
Charles Lambert

QUESTIONS PRESENTED

1.

Whether any action of Respondents interferred with Petitioner's substantive right of access to the courts.

2.

Whether any policy of Respondent City of Texarkana, Texas, was the "moving force" behind the alleged deprivation of Petitioner's right of access to the Court.

3.

Whether the Respondents were entitled to qualified immunity with respect to any claim that they violated Petitioner's right of access to the Courts.

4.

Whether the subjective intent of a law enforcement officer whose physical actions do not exceed the permissible

scope of a search pursuant to a search warrant can form the basis of §1983 liability.

5.

Whether, in a §1983 civil damage suit alleging an unlawful seizure of property, plaintiff bears the burden of proving that the property seized was neither within the scope of a warrant nor subject to seizure under the plain view doctrine.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 through A-116) is reported at 884 F2d. 804. The memorandum opinion of the district court (Pet. App. A-119 through A-182) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1989. Petitioner's petition for rehearing was denied on November 13, 1989. (Pet. App. A-117). The Petition for a Writ of Certiorari was received by Respondents on February 15, 1990. The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Statement of the Facts

This civil rights action arose out of actions taken by representatives of the law enforcement agencies of Texarkana, Texas, Miller County, Arkansas, Sevier County, Arkansas, and the City of DeQueen, Arkansas, in the process of an investigation into a spate of burglaries which occurred in Southwest Arkansas during December, 1980, and part of January, 1981. A cooperative investigation between these law enforcement agencies revealed that much of the property stolen in the aforesaid burglaries had been taken by the burglars to Texarkana, Texas, and then sold to James Ralston Crowder, proprietor of the J. R. Crowder Insurance Agency. A search warrant was issued by a magistrate in Texarkana, Bowie County, Texas, authorizing a search for and seizure of four

described items of jewelry and coins and one described piece of paper. Said warrant was executed at the premises described therein, the J. R. Crowder Insurance Agency, in Texarkana, Texas, by Respondent Gary Adams, a police officer employed by the City of Texarkana, Texas. Officer Adams invited Miller County Sheriff's Deputy H. L. Phillips (who had served as Affiant for the search warrant affidavit), DeQueen, Arkansas, Chief of Police Bill Jones, and Sevier County, Arkansas, Sheriff David Godwin, as well as representatives of the Arkansas State Police, who had been assisting in investigating a number of similar burglaries, to accompany him on the search. Ken Sinyard, Sheriff of Miller County, Arkansas, and Respondents Raffaelli and Elliott were also present at the insurance agency for a period of time before the officers left the

premises.

After James Ralston Crowder admitted the officers to his insurance agency he inquired of Officer Adams what he was looking for, and was read the description of the items to be seized from the search warrant affidavit. Crowder then walked into his personal office inside the agency, opened the drawer of his desk, pulled out a piece of paper matching the description of one of the items listed on the affidavit, handed it to the officers, and explained what it was. Crowder then informed Adams that a sweatshirt and gloves located on the floor in his personal office had been left there by the burglary suspects on one occasion when he had purchased property from them. Crowder then asked what other items Officer Adams was looking for. Upon being again read the list of items on the warrant, Crowder

advised that he kept his "stuff" in his fileroom, in locked file cabinets that he referred to as safes. Adams and Crowder, accompanied by some of the other officers, went into the fileroom and Crowder unlocked his filing cabinets and discussed with Adams the contents of each drawer. Out of the first filing cabinet Adams seized a plastic ziplock bag which contained numerous items of gold and silver such as earrings, tie tacks, pens, rings, a watch, etc. that Crowder advised had been purchased from the burglary suspects. Most of these items were not listed on the warrant. However, the burglary suspects had previously admitted that everything they had sold to Crowder had been stolen.

The second file cabinet was then opened and Adams seized ten (10) plastic packets of coins which, according to Adams' testimony, Crowder

had advised had been purchased from the suspects.

When the search of the second file cabinet was completed, Adams took the coin sets and the plastic ziplock bag full of merchandise which he had seized and placed them on a desk or table in the hallway, where another officer, Louis Aycock, was stationed. Respondent Phillips then came to the table and looked at the merchandise that had already been seized (because those items had admittedly been purchased by Crowder from the burglary suspects, and since the burglary suspects had previously stated that all items they had sold Crowder had been stolen), and noticed among the seized items a ring which he recognized as fitting the description of one which had been stolen in a Miller County burglary. Phillips then contacted the Miller County Sheriff's Department -

approximately eight (8) blocks distant - and had a deputy deliver a stolen property report from a particular Miller County burglary, which was checked against the items which had already been seized and laid out on the desk.

Meanwhile, the search had proceeded to a footlocker in the fileroom, which Crowder unlocked at Adams' request. After the footlocker had been opened, one of the Arkansas Officers who had accompanied Adams into the fileroom advised that the pattern on some flatware in the footlocker matched that of a set stolen from a home in his jurisdiction; Adams seized two pieces therefrom and told Crowder to maintain possession of the rest until it could be conclusively determined if this property was stolen.

Since some of the items on the search warrant affidavit had still not

been located, the search proceeded to what has become known in this litigation as the "Johnson desk" in another section of the insurance agency. Adams looked inside the drawers of the desk and saw a set of silver earrings that appeared to be cut out of quarters. Adams recalled that the theft of such a set of earrings had been confessed to previously by the burglary suspects, and Crowder advised that the earrings had been sold to him by the suspects. Thereupon, Adams seized the earrings.

A discussion occurred with respect to whether or not an on-site inventory of the seized items was feasible (such was not at that time required by Texas law) and one was commenced but not completed. The property which had been seized and placed on the desk was, instead, placed in an evidence bag and taken from the Crowder agency to the

Texarkana, Texas, Police Department (approximately three (3) city blocks away), where it was immediately and painstakingly inventoried. Deputy Phillips of the Miller County Sheriff's Office then inquired whether it was permissible for him to take the seized property to his office, approximately six (6) blocks away in Texarkana, Miller County, Arkansas, to be held in the Miller County Sheriff's Department's safe until it could be viewed by burglary victims in Arkansas for purposes of burglary-specific identification. The Texarkana, Texas, Police Officers asked Bowie County Criminal District Attorney Raffaelli if it was permissible for the property to be transferred to Miller County under such circumstances, and Raffaelli advised them that in his opinion such an action was permissible. Deputy Phillips then signed the Texarkana,

Texas, Officer's copy of the inventory acknowledging his receipt of the seized property, and took same with him to the Miller County Sheriff's Office's safe where it was deposited. The next day, the seizing officer's return, along with a copy of the inventory and the receipt given for the property by Miller County Sheriff's Deputy Phillips, was filed of record with the magistrate who had issued the search warrant.

Within a day or two of the search, Petitioner initiated an action in a Texas State Court (not the court of the magistrate who had signed the search warrant and in whose office the return and inventory had been filed) claiming that the search was unlawful. Only Respondents Raffaelli and Elliott, Texarkana, Texas Police Officer Louis Aycock, and FBI Agent Don Lambert were named as Defendants and served in that

state court action. A few days later, a hearing was held in that lawsuit in Bowie County District Court on James Ralston Crowder's request for a temporary mandatory injunction directing the named officers to deposit the seized property to the registry of the court. The Court, although advised that the property was in Texarkana, Miller County, Arkansas, in the safekeeping of the Miller County Sheriff's Department,[1] entered what it referred to as a temporary mandatory injunction, ordering those parties who had been served (which it knew it did not have possession of the property) to deposit the property into the registry of the court. The Texas officers

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[1] The Petitioner's allegation that the Texas officers did not inform the State court that the property had been relinquished to the custody of officers of another state (Pet. p. xxi) is patently false, and Respondents vehemently object to this falsehood.

contacted the Miller County Sheriff's Department, but the Miller County officials, acting under legal advice, elected not to return the property because they had not been made parties to the Texas state court action. An appeal by Aycock, Raffaelli, and Elliott of the state court's order was dismissed on the grounds that, no matter how erroneous the order might be, contrary to what the Texas state district court judge had said, the order in question was not, in fact, a temporary mandatory injunction, but was instead an interlocutory order and was thus unappealable. Despite obtaining full knowledge of the identities of all involved parties, through discovery, however, the Crowder's never amended their pleadings in the state court action to name the Miller County officials as defendants, and thus never placed themselves in a position to seek

an in personam order of the Bowie County District Court directing the parties having custody of the seized property to deposit same into the registry of the court. Instead, Plaintiffs allowed their action in the District Court of Bowie County, Texas, to be dismissed for want of prosecution.

Rather than pursuing their remedies in the state court, the Crowders instituted this action under §1983 alleging that the present Respondents, as well as certain other persons named as defendants, had, inter alia, violated their Fourth Amendment rights to be free from unreasonable searches and seizures and their constitutional right of access to the courts. The Crowders also alleged that Defendants had engaged in a conspiracy to deprive them of their civil rights and that James Ralston Crowder had been

unlawfully arrested.

II. Proceedings Below

After trial by jury, the Honorable William Wayne Justice, presiding over the United States District Court for the Eastern District of Texas, submitted the Crowder's §1983 allegations upon special interrogatories. The jury, in response to the special interrogatories submitted, found that the officers in question had not engaged in a conspiracy, but that there was a defect in the search warrant's description of one of the items to be seized and the place to be searched. The jury found, however, that all of the officers involved had acted with an objectively reasonable belief that the search warrant was valid. The jury found that Respondents Sinyard, Phillips, Godwin, Jones, and Charles Lambert (but not Officer Adams, who was in charge of the

search) had "intentionally searched the business premises of the Plaintiff for property not described in the search warrant", and that Respondents Sinyard, Phillips, Jordan, Adams, Raffaelli, Elliott, and Campbell, were "directly responsible" for the movement of the seized property from Bowie County, Texas, to Arkansas "beyond reach of the Texas courts, without proper judicial authorization, thereby interfering with the Plaintiffs' right under Texas law to determine whether they had a right of ownership in the seized property and their right to seek its return". The jury also found, inter alia, that no defendant had searched in any place where it was not reasonable to suspect that the items listed on the search warrant could be found, and that Crowder had not been arrested. The jury awarded James Ralston Crowder damages in the amount of $80,000.00,

and awarded Nancy Crowder damages in the amount of $10,000.00, upon being instructed that they could award to such plaintiffs "the loss of past earnings, any physical harm to the plaintiffs in the past, including ill-health, physical pain, disability or discomfort, any reasonable expense for medical care, treatment and services required and received by the plaintiffs in connection with their physical injuries, and the abstract value of any constitutional right found to have been infringed as a direct result of the allegedly wrongful actions of the defendants". Subsequently, substantial attorneys fees were awarded to Petitioner's several attorneys.

The City of Texarkana, Texas, and Charles Ray Campbell were subsequently granted judgments notwithstanding the verdict. All remaining defendants appealed to the United States Court of

Appeals for the Fifth Circuit under 28 U.S.C. §1291. The plaintiffs cross-appealed the grant of judgment n.o.v. for the City of Texarkana, Texas, and one of Plaintiff's attorneys (the son of Petitioner) appealed what he considered to be an insufficient award of fees. The Fifth Circuit panel reversed all judgments in favor of the Crowders, rendered as to each individual defendant, remanded the case for retrial as to Sevier County, Miller County, and the City of DeQueen, Arkansas, on certain issues, and vacated each award of attorney's fees.

A Petition for Rehearing and Suggestion for En Banc Consideration was filed by Petitioner and was denied on November 13, 1989. Nancy Crowder's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was received by Respondents on February 15, 1990. This

brief, which is filed on behalf of all Respondents with the exception of Charles Lambert (who is represented by separate counsel) is in opposition to the aforesaid petition for writ of certiorari.

OBJECTIONS TO MISSTATEMENTS OF FACT OF LAW SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI

At Page xvii - xviii of Petitioner's Statement of the Case, she states that "trial to a jury resulted in verdicts finding that the defendants had violated the plaintiff's right of access to the courts and that they had intentionally searched for property not listed in the warrant, in violation of plaintiffs' right to be free from unreasonable searches and seizures." Respondents would deny that the verdicts of the jury found that defendants had violated the plaintiffs' right of access to the courts, first of all because the jury was asked not whether the defendants had violated the plaintiffs' right of access to the courts, but whether defendants had removed a portion of the seized property from Bowie County, Texas, to Arkansas "beyond reach of the Texas

courts, without proper judicial authorization, thereby interfering with the plaintiffs' right under Texas law to determine whether they had a right of ownership in the seized property and their right to seek its return." Respondents' position, with which the Fifth Circuit Court of Appeals agreed, is that of an affirmative answer by the jury to such a special interrogatory is not equivalent to a finding that any defendant violated the Petitioner's right of access to the courts. Secondly, Respondents would point out that the jury did not find "the defendants" to be directly responsible for the removal of the seized property from Bowie County, Texas, to Arkansas, but found only that Respondents Adams, Raffaelli, Elliott, Sinyard, Phillips, and Jordan were directly responsible for the removal.

Similarly, despite the insinuation

of, the above quoted statement in Petitioner's Statement of the Case, only five defendants (Respondents Sinyard, Phillips, Godwin, Jones and Lambert) were found to have intentionally searched for property not listed in the warrant. Moreover, under the particular circumstances of this case, where no search occurred outside the legitimate scope of the warrant which was being executed, it is Respondents' position, as was adopted by the Fifth Circuit Court of Appeals, that the finding that these five (5) individual Respondents intentionally searched for property not listed in the warrant is insufficient to establish that a constitutional violation had occurred.

At page xix of Petitioner's Statement of the Case she states that "on January 27 and 28, 1981, law enforcement officers from seven

jurisdictions, acting under color of a warrant issued by a magistrate in Bowie County, Texas, entered the business premises of the plaintiffs ..." . Respondents would point out that the reference to two (2) dates (January 27 and 28) is misleading, in that the search began shortly before midnight and extended into the early morning hours the next day; there were not two separate entries by law enforcement officers as Petitioner's statement implies. Furthermore, Respondent law enforcement officers did not act "under color of a warrant", but pursuant to a warrant issued by a magistrate in Bowie County, Texas, in entering the business premises of James Ralston Crowder.

At Page xx of Petitioner's Statement of the Case, she states that "during a three hour search, numerous items of jewelry and coins were removed from locked file safes, but were not

marked, nor tagged." Respondents would point out that the items which were removed from the locked file safes were placed on a desk and by one of the officers, who subsequently placed same collectively in one evidence bag which was taken to the Texarkana, Texas, Police Station and immediately inventoried at the conclusion of the search.

Also at Page xx of Petitioner's Statement of the Case, Petitioner states that "plaintiffs' request for an inventory and a copy of the warrant was denied". Respondents would point out that James Ralston Crowder's own testimony was to the effect the he was told he could pick up a list of the property which had been seized the next day, and that at the time no Texas Rule of Criminal Procedure required an officer executing a warrant to either leave a copy of the warrant at the

seized premises or provide an on-site inventory.

At Page xxii of Petitioner's Statement of the Case, Petitioner states that "the defendants continued to refuse to permit the plaintiffs to have a copy of the warrant and return". Respondents would point out that the warrant and return had been filed by Respondent Gary Adams in the office of the magistrate who had issued the search warrant the day after the search occurred. If, therefore, the Crowders did not obtain a copy of the warrant and return, it was not the fault of any of the Respondents. Also at Page xxii of Petitioner's Statement of the Case, she states that "all defendants claim they were unable to comply" with an order issued by the federal district court directing all defendants to comply with the state court order. Respondents would point out that

Petitioner never objected to the responses to the said district court order filed on behalf of any defendants with the exception of Miller County, Ken Sinyard, H. L. Phillips, and Allan Jordan, and never actually pursued a hearing on the objection she filed with respect to the filings of those Respondents. The sufficiency of Respondents' actions in response to the United States District Court's order have, thus, never been subjected to judicial review, did not form a basis for the judgment below, and thus cannot form a basis for action by this court on the petition for writ of certiorari.

On Page xxiii of Petitioner's Statement of the Case, she states that "subsequent to the entry of the damages judgment, Plaintiff J. Ralston Crowder died ..." . While this is a correct statement, Respondents wish to point out that J. Ralston Crowder's death

took place several years after the incident allegedly occurred in this case, and was not related to any events pertinent to this proceeding.

At Page 12 of Petitioner's Petition for Writ of Certiorari, she states that the Arkansas officers "were looking for items on their stolen property lists, brought with them to the scene for the purpose of recovery, regardless of court approval. The officers apparently viewed the search warrant as a general admission ticket to search". Respondents specifically deny these unfounded allegations which have no basis either in the judgment of the court below, the record in the court below, or in fact.

At Pages 12 through 13 of Petitioner's Petition for Writ of Certiorari, she alleges that "the trial testimony repeatedly confirmed that the officers believed, on the basis of what

the suspects had told them, that all property taken as Arkansas burglars had been brought to Crowder's office in Texarkana, Texas. Nevertheless, no presentation was made to the magistrate in order to obtain a warrant authorizing the seizure of such property. Again, the officers, and the burglary suspects they employed in the search usurped the judicial function by making on the scene determinations of probable cause. There was as much probable cause to obtain a warrant for the property taken in other burglaries as there was to obtain the warrant actually issued." Respondents deny these allegations and specifically point out that, contrary to Petitioner's assertions, there was not probable cause to believe that items taken more than just a few days prior to the search would still be located at the Crowder premises, because the

burglars had confessed to the investigating police officers that Crowder had informed them he was having the stolen gold and silver items which they had sold to him melted down quickly in order that they could not be traced. Hence, probable cause to believe that stolen items were located at the Crowder premises existed only with respect to the most recent burglaries, which were mentioned in the affidavit for search warrant. Moreover, Respondents deny that they ever "usurped the judicial function" by making on-the-scene determinations of probable cause, except to the extent necessary to make seizures under the plain view doctrine in the manner in which they were authorized to do by law.

At Page 14 of Petitioner's Petition for Writ of Certiorari, she alleges that the officers went to the

Crowder premises "intending to find and seize items not listed on the warrant". Respondents deny that this was the case, because as stated at trial, they did not believe that items not listed on the warrant would still be present at the Crowder agency at the time of the search.

At Page 15 of Petitioner's Petition for Writ of Certiorari, she states "intentional searching negates any question of inadvertence; the subjective intent of the officers is materially relevant to any claim of plain view discovery as a justification for a warrantless seizure." In this regard, Respondents would point out that Petitioner has inappropriately mixed the concepts of "searching" and "seizing". One does not "search" under the plain view doctrine, but merely "seizes" property found while searching for other items. Since the jury in

this case did not find any of the defendants who "intentionally searched" for items not listed on the warrant seized any items (pursuant to the doctrine of plain view or otherwise), Petitioner's argument is not only erroneous but totally irrelevant.

Additional areas in which Petitioner has misstated the facts of the law in this case are pointed out within the argument portions of this brief in opposition.

ARGUMENT

QUESTION NO. 1: WHETHER ANY ACTION OF RESPONDENTS INTERFERED WITH PETITIONER'S SUBSTANTIVE RIGHT OF ACCESS TO THE COURTS.

I.

Petitioner contends (Pet. 1-9) that the Court of Appeals erred in holding as a matter of law that the Petitioner's right of access to the courts in the State of Texas was not violated. There is no merit to Petitioner's contention.

As stated in Doe v. Schneider, 443 F. Sup. 780, 784 (D. Kansas, 1978), the right of access to the Courts is a nebulous concept, and even its constitutional origins are unclear. By far the most common cases dealing with the right of access to the courts are cases involving indigent prisoners, and their right to file pro se habeas corpus petitions and civil rights

lawsuits free from harassment, retaliation and unnecessary restrictions. The extension of the right outside the area of prisoner suits has been sporadic and ill-defined. See, Doe v. Schneider, supra. The historic basis for invocation of the right is a situation where there is a threat that a "protected class" of individuals is being systematically denied the ability to litigate matters of fundamental importance. See, Boddie v. Connecticut, 401 U.S. 317 (1971), NAACP v. Button, 371 U.S. 415 (1963), Johnson v. Avery, 393 U.S. 483 (1969).

In Ryland v. Shapiro, 708 F2d. 967 (5th Cir., 1983), the Fifth Circuit held (in the context of an appeal from a summary judgment) that a cause of action for denial of the right of access to the courts could conceivably be founded upon actions of state officials in covering- up evidence of a

murder in such a manner as to prevent or delay the parents of the victim from instituting a suit for her wrongful death.

The Fifth Circuit Court of Appeals acknowledged that the Petitioner was urging the breaking of "new ground" in the area of the law relative to the constitutional right of access to courts, in that she alleged neither a cover-up nor a retaliation. The Fifth Circuit specifically found that, contrary to the claims of the Petitioners, adequate, effective, and meaningful access was available under the Texas law, and that the responsibility for Petitioners' failure to utilize such access effectively was not chargeable to Respondents.

The Fifth Circuit pointed out that the substantive right of access does not guarantee one the right to have one's case proceed in a particular

procedural posture or guarantee the right to a particular form (or forum) of relief. As both Petitioner and the district court conceded, the petitioners could have amended their Texas state court pleading to add all of the Arkansas officials as defendants under the Texas Long Arm Statute, insofar as they could be characterized as tortfeasors whose offending acts -- allegedly participating in the seizure and obtaining allegedly unlawful possession of the property -- occurred in Texas. Had Petitioners done this in the Texas state court, the full panoply of the Texas state court's powers would have extended to the person in actual possession of the property (the Sheriff and/or Deputy Sheriff of Miller County, Arkansas), thus indirectly insuring the court's ability to maintain physical control of the property. Moreover, if, as the Petitioners allege, the Texas

officials wrongfully failed to retain custody of the property, there is a substantial possibility that the Texas officials - as well as the Arkansas officials (should the Petitioners have chosen to join them as defendants in the state court action), would have been liable for money damages in an action sounding in tort, should the property not have been recovered. The failure of Petitioners to pursue aggressively all of their legal remedies cannot be the basis for imposing liability upon the Respondents. Furthermore, the Crowders could have, but elected not to seek in rem relief from the State courts of Arkansas, one of which was located less than six (6) blocks from the Crowder agency, and substantially closer to Petitioner's home and business than the Texas district court.

Petitioner is particularly adamant

in asserting that the seized property was "secretly" and "without judicial authorization" removed from the state of Texas in a manner which transgressed the procedure set up by state law to challenge the seizure. First of all, there was nothing "secret" about the transfer of custody of the seized property to the Miller County, Arkansas, Sheriff's office. The officer's return, clearly showing that custody of the property had been transferred to the Miller County Sheriff's Office, was filed as a public record the day after the search. With regard to Petitioner's characterization of the transfer of the property as "without judicial authorization", it should be pointed out that the Texas statute applicable to the safekeeping of property seized pursuant to search warrant at the time of the search in question read as follows:

> "When a warrant has been issued to search a suspected place and there be found any property as alleged to have been there kept and concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate." Texas Code of Criminal Procedure, Article 18.11 (emphasis added.)

Petitioner puts much emphasis on this vague and ambiguous provision, and particularly upon the phrase "subject to the further order of the magistrate" with which it concludes. She tries to argue that the property was required to be at all times "subject to the further order of the magistrate." Petitioner ignores the comma between the words "same" and "subject". With that comma, the language more likely should be interpreted to mean that, until the magistrate (i.e., the magistrate who issued the search warrant) orders otherwise, the seizing officer has the responsibility to make appropriate

arrangements for the safekeeping of the property. The statute does not purport to direct the officer as to what arrangements he should make; to the contrary, he has full discretion in that regard. While Article 18.09 of the Texas Code of Criminal Procedure directed the officer to carry the seized property before the magistrate, under Texas law, this requirement, as well as the "inventory" requirement (and likely every other requirement of Article 18, including the above quoted language) has been held to be directory as opposed to mandatory. See, Campbell v. State, 373 S.W.2d 749 (Tex. Crim. App. 1963); Rios v. State, 623 S.W.2d 496 (App. 1981); Joshua v. State, 696 S.W.2d 451 (App. 14, Dist. 1985, rev. ref'd.); Robles v. State, 711 S.W.2d 752 (App. 4, Dist. 1986, rev. ref'd.); Petitioner's own "expert witness", Lupe Salinas, confirmed this in his

testimony. Petitioner's reliance upon these discretionary/directory procedural provisions is therefore clearly misplaced. Moreover, even if Petitioner were correct in her interpretation of this language, a violation of state law (even if the state law were undeniably mandatory, which these were not) does not create liability under Sec. 1983 "unless the right encompassed in the state statute is guaranteed under the United States Constitution." Gramenos v. Jewel Companies, Inc., 797 F2d. 432 (7th Cir. 1986). The statutes relied upon by Petitioners do not create a private cause of action and are too vague and nonspecific to be considered to encompass any federal constitutional right.

Petitioner argues (Pet. at 9) that "prejudice to the Plaintiffs is patent on the record." In actuality, however,

the theoretical "prejudice" which Petitioners complain of was clearly caused by Petitioners' own failure to (a) join the proper persons (the persons having custody of the seized property) as parties defendant in the Texas state court action (b) seek in rem relief in the Arkansas court (which was physically closer to Petitioner and her attorney anyway) under the Arkansas Rules of Criminal Procedure; and (c) if they were dissatisfied with Respondents' filings in response to the interlocutory orders of the state and federal court, to prosecute a motion for contempt. The real problem is not that the remedies Plaintiff seeks were not available, but that the available remedies were not effectively sought.

II.

QUESTION NO. 2: WHETHER ANY POLICY OF RESPONDENT CITY OF TEXARKANA, TEXAS, WAS THE "MOVING FORCE" BEHIND THE ALLEGED DEPRIVATION OF PETITIONER'S RIGHT OF ACCESS TO THE COURT.

Petitioners also complain (Pet. pp. 9-10) that the Court of Appeals erred in affirming the Judgment Notwithstanding the Verdict which was granted in favor of the City of Texarkana, Texas. Petitioners portray the Court of Appeals' opinion as stating that the City of Texarkana cannot be held liable solely because the complained-of actions of the City's employees were not undertaken pursuant to a policy of the City that was itself unconstitutional. The primary basis for the Fifth Circuit Court of Appeals' opinion exonerating the City of Texarkana, however, was not that the "policies" alleged by the Petitioner were not themselves unconstitutional, but was that, whether the underlying

policies were constitutional or not, the city could not be held liable under Sec. 1983 because these policies had not been shown to be the "moving force" behind any constitutional violation. As the Fifth Circuit Court of Appeals' opinion pointed out, there was nothing in the record indicating that any policy of the City of Texarkana reflected deliberate indifference to any constitutional concerns or constituted anything other than generic policies favoring effective law enforcement. The Fifth Circuit properly concluded that such general policies could not be read as being the "moving force" behind any asserted unconstitutional acts. 804 F2d. at 831.

III.

QUESTION NO. 3: WHETHER THE RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO ANY CLAIM THAT THEY HAD VIOLATED PETITIONER'S RIGHT OF ACCESS TO THE COURTS.

Petitioners further contend (Pet. pp. 10-11) that the Fifth Circuit Court of Appeals erred in holding that the individual respondents were entitled to qualified immunity with respect to the alleged deprivation of the right of access to the courts. In support of this contention, Petitioners argue that the law enforcement officers who seized property from the Crowder Insurance Agency had no discretion, under state law, with regard to the safekeeping of the seized property. As previously stated, however, this was simply not the case. The statutory provisions in question did not purport to direct the officer as to what safekeeping arrangements he should make. To the contrary, those provisions give full

discretion to the officer in regard to safekeeping. Moreover, applicable case law interpreting the "requirements" of the Texas Rules of Criminal Procedure relative to the disposition of seized property had held same to be directory, or discretionary, in nature, as opposed to mandatory. See, Campbell v. State, 373 S.W.2d 749, (Tex. Crim. App., 1963); Rios v. State, 623 S.W.2d 496 (Tex. Crim. App. 1981); Joshua v. State, 696 S.W.2d 451 (Tex. Crim. App. - 14, 1985, rev. ref'd.); Robles v. State, 711 S.W.2d 752 (Tex. Crim. App. - 4, 1986, rev. ref'd.). Moreover, as has been previously pointed out, the applicable section, §18.11, at the time of the search did not specifically prohibit the action taken, but merely in vague and ambiguous terms advised the seizing officer that it was his responsibility to provide for the safekeeping of the seized property

until the "magistrate" (the one who issued the search warrant) ordered him to do something else with it. The officer in this case did make arrangements, in the exercise of his discretion, for the safekeeping of the seized property, and same has been safely kept as required. What is more, the "magistrate", Ben Grigson, has never been requested by Petitioners to, and has never, issued any "further order". Furthermore, under Davis v. Scherer, 468 U.S. 163 (1984):

> "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision. ...

In a footnote, the court in Davis v. Scherer, dismissed the "ministerial duty" approach apparently argued for by the Petitioners stating:

> "... a law that fails to specify the precise action of

> the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused. Id. at Note 14.

Hence, this is not a proper case for a determination that an alleged violation of a statutory provision by state officials obviated their right to qualified immunity.

IV.

QUESTION NO. 4: WHETHER THE SUBJECTIVE INTENT OF A LAW ENFORCEMENT OFFICER WHOSE PHYSICAL ACTIONS DO NOT EXCEED THE PERMISSIBLE SCOPE OF A SEARCH PURSUANT TO A SEARCH WARRANT CAN FORM A BASIS FOR §1983 LIABILITY.

Petitioners also contend, in their argument under "Petitioners' Second Question", (Pet. 12-16) that the Fifth Circuit Court of Appeals erred in holding that, since the search of Mr. Crowder's insurance agency at no point exceeded the search that was authorized by the warrant, no "unreasonable search", as that term is defined under

the Fourth Amendment, occurred.

Analysis of this contention of Petitioner must begin with a review of the jury's findings in regard to the search. The jury was asked:

> "Did Plaintiffs prove that any one or more of the Defendants searched in places within the plaintiff J. Ralston Crowder's business premises where it would be unreasonable to find the items described in the search warrant?"

Their answer was negative as to each defendant, including Jones, Godwin, Phillips and Sinyard. The only evidence of any "search" by Jones, Godwin, Phillips or Sinyard was testimony that they either "looked" into the drawers of J. Ralston Crowder's file safes when they were opened by Officer Adams (or by Crowder himself) and/or that they sifted through already-seized items located on top of a table or desk. Since these individuals merely observed what was

open to view, they did not subject Plaintiff to an unreasonable search or seizure. Petitioner's claim that an unreasonable search or seizure occurred is based solely on evidence of what Petitioners consider a bad desire or motive on the part of Jones, Godwin, Phillips and Sinyard as was found by the jury in response to another special interrogatory. Petitioner says that, when Officer Adams looked into the drawer, footlocker, desk, etc., the other officers looked too, and points out that, according to the jury, the subjective intellectual desire of Jones, Godwin, Phillips, Sinyard, and Lambert was to find items which, unbeknownst to some of them, were not listed on the search warrant. A lesser (or at most equal) physical intrusion than was deemed not a basis for liability on the part of the Texarkana, Texas, police officers (who were not

found by the jury to have violated the Fourth Amendment) is thus, according to Petitioner, magically made a basis for liability on the part of Godwin, Jones, Phillips and Sinyard, merely because of a thought-process going through the minds of these men, who naturally asked themselves the question "I wonder if any of the property from the burglaries in my jurisdiction is in there?" There is no evidence or jury finding that the mental process going on in the minds of the named officers as they "looked" or "observed" the contents of the drawers, etc., which Adams and/or Crowder opened, caused the search to be any more intrusive or extensive than same would have been had these men somehow closed their minds to the thought that the stolen property from their respected jurisdictions might be present. If, of course, there had been evidence that Jones, Godwin, Phillips

was looking for, the items listed on the warrant, the items in question must have been in plain view. The jury's finding that some, but not all, of the seized items were in plain view cannot be explained except by the trial court's incorrect placement on the defendants of the burden of proof on this issue - i.e., because Defendants did not go through the entire laundry list of items seized and explain where each individual item (most of which were seized collectively) was located. The Fifth Circuit correctly held, in accordance with the long standing rule that the plaintiff bears the burden of proving each and every element of a claim, that the trial court erred in placing upon the defendants the burden of proof on this issue. It is clear that to recover under §1983, a plaintiff must prove two vital elements: (1) that he has been deprived

of a right secured by the Constitution and the laws of the United States; and (2) that the persons depriving him of this right acted under color of any state statute..." Daniel v. Ferguson, 839 F2d. 1124, 1128 (5th Cir. 1988). In the context of claims based upon a deprivation of Fourth Amendment rights, the burden of proof on these elements is equally well established: plaintiff must prove the existence of each element by a preponderance of the evidence. Because the Crowders in their complaint alleged a deprivation of their Fourth Amendment rights, and specifically their right to be free from unreasonable searches and seizures, to prevail under §1983 it was incumbent upon them to prove by a preponderance of the evidence that the search of the Crowders' office and the seizure of their property was "unreasonable" as that term is

understood in the context of the Fourth Amendment. The Fourth Amendment, however, is not violated merely because state officials lack a warrant to arrest someone or to perform a certain seizure; to the contrary, a considerable body of law is devoted to the proposition that, in specified situations, arrests, searches, and/or seizures of property may be "reasonable" under the Fourth Amendment notwithstanding the fact that the officials had not previously obtained a warrant specifically authorizing the particular actions challenged. §1983 plaintiffs commonly challenge warrantless arrests, searches and seizures. In light of this fact, the burden of proof in a §1983 case based upon an alleged Fourth Amendment violation cannot be shifted to state officials merely because the plaintiff establishes that some of the officials'

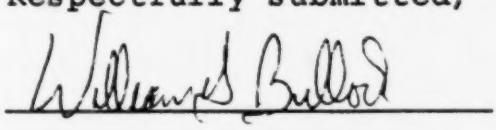
actions were not specifically authorized by a warrant. Plaintiff must still prove that state officials have committed a wrongful act, and since it does not necessarily follow from either the absence of a warrant or a seizure beyond the scope of a warrant that any wrongful act has been committed, merely proving that an item was seized that was not specifically mentioned in a warrant does not satisfy the plaintiff's burden of proof.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Respondents did not interfere with Petitioner's substantive right of access to the courts. No policy of the City of Texarkana was the "moving force" behind the actions alleged to have violated Petitioner's civil rights. The individual Respondents cannot be said to have lost their right to claim qualified immunity with respect to Petitioner's claims. Where the intrusion of a search does not exceed that authorized by a warrant despite the fact that some officers subjectively desired to find items that, unbeknownst to them, were not listed on the search warrant as items to be seized, there has not been an unreasonable search or seizure actionable under §1983. The Fifth

Circuit properly placed upon civil rights plaintiffs the burden of proving that a constitutional violation occurred; where the issue is whether a seizure was or was not lawful under the plain view exception to the warrant requirement, it is the plaintiff's burden to prove the seizure was not lawful.

Respectfully submitted,

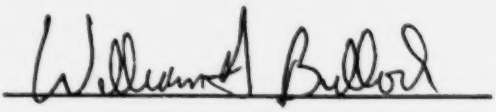


William G. Bullock
HUBBARD, PATTON, PEEK,
HALTOM & ROBERTS
P. O. Box 1928
Texarkana, Texas 75504
(214) 794-3341

Counsel for all
Respondents except
Charles Lambert

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari were forwarded to Attorney General for the State of Arkansas, attorney for defendant Charles Lambert, and to Mary L. Sinderson, attorney for Petitioner, Nancy Crowder, by depositing same, postage prepaid, in the United States Mail on the 19th day of March, 1990.



William G. Bullock

or Sinyard struck out on their own, and searched places left undisturbed by Adams, and in places where it would be unreasonable to find the items listed on the search warrant, their subjective thought processes -- the intellectual desire to find property which, unbeknownst to them, was not listed on the search warrant -- might have resulted in some actionable intrusion upon plaintiffs. This, however, was not the case. What these particular men were thinking to themselves as they entered the Crowder agency, or as they looked over Adams' shoulder into the open drawers and footlockers, had absolutely no impact on the scope, length or severity of the intrusion that was made into J. R. Crowder's privacy. "Thoughts" cannot unreasonably intrude upon a man's privacy or violate his rights in any way. If these men are held liable in

this case, however, it will not be for anything they did -- others did more or at least the same and were not held liable -- but for something they thought. Such should not be considered a viable basis for recovery under §1983. Petitioner also engages in flights of fancy far outside the record by suggesting that Jones, Godwin, Phillips, Lambert and Sinyard went to the premises "intending to find and seize items not listed on the warrant". It is answer enough to this statement that the jury never found that any defendant went to the Crowder's premises intending to find and seize items not listed on the warrant. The closest submission to this allegation of Petitioners was her "conspiracy" theory, which was specifically rejected by the jury. The jury merely found that once on the Crowder premises, Jones, Sinyard, Godwin, Phillips and

Lambert intentionally searched for things not on the warrant. Moreover, the evidence adduced at the trial level was to the effect that Defendants did not have probable cause to believe that the items not listed on the warrant (which were items which had been stolen in burglaries significantly prior in time to the specific burglaries mentioned in the search warrant affidavit) would still be located on the Crowder premises. The information possessed by the officers in question was that Mr. Crowder, who had been purchasing stolen property from the burglars over a series of months, was rapidly melting down the gold and silver items and disposing of the rest such that chances were slim that any items taken other than in the most recent burglaries would still be on the premises. Certainly, while any good police officer would have subjectively

hoped to come across stolen property even beyond that which probable cause existed to believe was still on the premises, Jones, Godwin, Phillips, Lambert & Sinyard cannot be said to have gone to the Crowder agency intending to find and seize items not listed on the warrant. As stated in the Fifth Circuit's opinion:

> "The subjective intent of the officers is irrelevant; the test, as the jury was instructed, is whether the 'officer knew in advance the location of [the] item', not whether he intended to look for it, on the possibility that it might be found, while he was lawfully on the scene." Pet. A-91.

Petitioner then (at Pet. pp. 14-16) launches into an analysis of what she deems "changes" in the law of search and seizure by reason of this Court's opinions in Texas v. Brown, 460 U.S. 730 (1983) and Arizona v. Hicks, 480 U.S. 321 (1987). Respondents do

not understand how Petitioner can realistically contend that a United States Supreme Court announcement of the law on a subject, at whatever time it is handed down, does not constitute the final authority as to what the law is on that subject. The law of plain view, as applicable to Respondents or anyone else, at any time, is what it was declared to be in Texas v. Brown and Arizona v. Hicks. Whether lower courts had, prior to those opinions, erroneously interpreted the plurality opinion in Coolidge is irrelevant. The law is what this Court in an opinion joined by a majority of its numbers says is the law. The law did not "change" as Petitioner contends when this Court decided Texas v. Brown and Arizona v. Hicks; earlier interpretations of the law were merely shown thereby to be erroneous. Respondents cannot, for purposes of

§1983, be held to a standard which was not, as this Court has determined, encompassed by the Constitution and laws of the United States.

V.

QUESTION NO. 5: WHETHER, IN A §1983 CIVIL DAMAGE SUIT ALLEGING AN UNLAWFUL SEIZURE OF PROPERTY, PLAINTIFF BEARS THE BURDEN OF PROVING THAT THE PROPERTY SEIZED WAS NEITHER WITHIN THE SCOPE OF A WARRANT NOR SUBJECT TO SEIZURE UNDER THE PLAIN VIEW DOCTRINE.

Petitioner also contends (Pet. pp. 16-17) that the Fifth Circuit Court of Appeals erred in holding that the burden of proof on the issue of whether the items seized were in plain view rested upon the Plaintiff. Petitioner apparently forgets that the instant case is not a criminal proceeding, wherein an accused is seeking exclusion of evidence seized from him and where the State has the burden of showing that it was lawfully seized, but a civil proceeding, in which Petitioner is seeking to obtain a substantial

monetary judgment from Respondents on the theory that Respondents violated her civil rights. In this context, the legality or illegality of any seizure of property is an issue on which Plaintiff must bear the ultimate burden of persuasion. Respondents fairly raised the plain view doctrine as a basis for the seizure of the items not described in the warrant, but the trial court refused to shift the burden of proof back to the Plaintiffs, and thereby required the Respondents to disprove an essential element of Plaintiff's case. The jury found specifically that no defendant searched in any place where it would be unreasonable to find the items on the search warrant. If the items seized came from the Crowder agency, and, as the jury found, they were found in places where it was reasonable for Respondent Adams to be looking for, and